313 U.S. 583

APR 25 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. ROBERT COHLER,
10 S. La Salle Street,
Chicago, Illinois,
Counsel for Petitioner.

THE BLAKISTON-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari 1-5

I. Summary and Short Statement of the Matter Involved 2-3

II. Jurisdiction 4

III. Question presented 4

IV. Reasons Relied On for the Allowance of the Writ 5

Brief in Support of Petition for Writ of Certiorari ... 6-38

Opinions of Court Below 6

Jurisdiction 6

Statement of the Case 7-11

Specification of Errors 12

Summary of Argument 13-14

I. Petitioner and B. C. Christopher & Company shall constitute gambling, there must be an affirmative intent by both parties not to deliver the commodities, but to settle on differences only which intention must be mutual and disclosed 15-18

II. A. Petitioner's transactions are presumed to be legal and the burden of proving them to be gambling contracts rests upon respondent who must prove their illegality by substantial evidence 18-19

B. The fact that most of petitioner's futures trades were closed out by offsetting purchases is not substantial evidence of an intention on the part of B. C. Christopher & Company or petitioner to gamble 19-23

III. A. Respondent failed to introduce any substantial evidence that B. C. Christopher & Company intended to gamble. On the contrary the evidence affirmatively showed their intention not to gamble 23-27

B. Respondent failed to introduce any substantial evidence that petitioner, himself, intended to gamble. All the evidence bearing on the question of his intent affirmatively showed that he did not intend to gamble....27-31

IV. The Circuit Court of Appeals erred in holding that the "P" and "S" slips used by petitioner's broker, the manner and method in which they kept their records and their reference to their futures department as the "option department" is evidence of an intent on their part to gamble 31-38

Conclusion 38

Appendix 39

Table of Authorities Cited.

Board of Trade v. Christie, 198 U. S. 236 19
Browne v. Thorn, 260 U. S. 137 .....18, 20
Cleage v. Laidley, 149 Fed. 346.....20, 22
Clews v. Jamieson, 21 Sup. Ct. 845; 182 U. S. 461....18, 38
Dixon v. Uhlman, 53 Sup. Ct. 362; 288 U. S. 188..... 29
Dustin Grain Co. v. M'Allister, 296 Fed. 611..... 19
Ehrlich v. Rothschild, 11 N. E. (2d) 623 .....
.....12, 16, 18, 23, 26, 29, 31
Gettys v. Newberger, 272 Fed. 209.....19, 20, 21
Hoyt v. Wickham, 25 Fed. (2d) 777.....15, 17, 21
Irwin v. Williar, 4 Sup. Ct. 160; 110 U. S. 499..... 18
Johnson v. Milmine, 150 Ill. App. 208..... 18
Lyons Milling Co. v. Goffe and Carkener, Inc., 46 Fed. (2) 241 15
Mullinix v. Hubbard, 6 Fed. (2) 109.....18, 20
Nash-Wright Co. v. Wright, 156 Ill. App. 243..... 36
Peto v. Howell, 101 Fed. (2) 353 .....2, 3, 6
Peto v. Howell, 117 Fed. (2) 249..... 3, 6
Ponder v. Jerome Hill Cotton Co., 110 Fed. 373..... 19
Riordon v. McCabe, 341 Ill. 506; 173 N. E. 660.....
.....12, 16, 22, 37, 39

Statutes Cited.

Illinois Revised Statutes 1939, Chap. 38, Sec. 328.....4, 15
Title 7, Chap. 1, Sec. 6 G of the Commodities Exchange Act (U. S. C. A.) .....
Title 15, Chap. 1, Sections 2 and 15, U. S. C. A..... 2, 4
Section 248 A of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, U. S. C. A. Sec. 347) 4

MISCELLANEOUS.

Commodities Exchanges by Baer & Woodruff (1929 Edition) 20

Hedging in Grain Futures, Official Bulletin No. 151 of the U. S. Department of Agriculture by J. M. Mehl. 33, 35

Legal Status of Trade in Futures by H. S. Irwin, 32 Ill. Law Rev. 155 21

Report of the Chief of the Commodities Exchange Administration to the Secretary of Agriculture dated September 25, 1939 20

Restatement of Contracts, Chap. 18, Sec. 523, pp. 1014, 1016; Sec. 523, p. 274..... 17

83 A. L. R. 563 36

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Soma Peto, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

A certified transcript of the Record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in compliance with Rule 38 of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Soma Peto, petitioner, since 1910, has been continuously engaged in the grain business (R. 74, 162). In 1927, he became and still is associated with B. C. Christopher & Co. of Kansas City, Mo., a large grain house which was and still is a member of various exchanges, including the Chicago and Kansas City Boards of Trade (R. 74, 75).

Thomas Howell, respondent, in 1931 was a large grain operator. Through use of various "dummy" accounts, through falsification of reports to the Grain Futures Administration (R. 48), he acquired approximately 8,000,000 bushels of July 1931 corn and thereby "cornered" the July, 1931 corn market on the Chicago Board of Trade. The total visible commercial supply of corn in the United States at the time of respondent's "corner" was only 8,123,000 bushels of which 7,673,250 were in Chicago, Respondent had acquired 7,440,975 bushels, constituting 97% of all deliverable corn in Chicago and 90% of the entire visible commercial supply in the United States. The details of the "corner" are set forth in the record (R. 41-50) and also in the opinion of the Circuit Court of Appeals reported in *Peto* v. *Howell*, 101 Fed. (2nd) 353, which was the appeal from the first trial, but where the facts of the monopoly were the same as in the last trial.

This action was brought under Title 15, Sec. 15, U. S. C. A., to recover damages sustained by petitioner as the result of respondent's monopoly of the trade in corn in interstate commerce in violation of Title 15, Chap. I, Sec. 2, U. S. C. A., commonly known as the Sherman Anti-Trust Act.

Respondent pleaded in defense: 1st, denial of violation

of Anti-Trust Law; 2nd, petitioner's transactions on the Chicago Board of Trade were gambles and hence no recovery could be had.

At the first trial, the Trial Court directed a verdict for respondent at close of petitioner's case on the ground that petitioner had not proved a monopoly by the respondent. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the Trial Court was reversed, the Court holding that the respondent had "cornered" the July 1931 corn on the Chicago Board of Trade and thereby monopolized the trade in corn in interstate commerce in violation of the Act aforesaid. This case is reported in *Peto* v. *Howell*, 101 Fed. (2nd) 353.

Upon a retrial of the case, the jury returned a verdict in favor of petitioner, finding all issues against the respondent. The Trial Court granted respondent a new trial from which petitioner could not appeal, the order not being final and appealable.

On the final trial, the Court directed a verdict in favor of petitioner on the issue of monopoly but permitted the jury to pass upon the affirmative defense of gambling. The jury found in favor of the respondent on that issue and the Trial Court entered judgment in favor of the respondent. On appeal to the Circuit Court of Appeals, the judgment was affirmed. See *Soma Peto* v. *Thomas Howell*, 117 Fed. (2nd) 249.

This petition is directed to a review of the last mentioned decision of the Circuit Court of Appeals.

JURISDICTION.

1. This is a suit involving diversity of citizenship, involving more than $3,000.00 exclusive of interest and costs, arising under the Sherman Anti-Trust Act, Title 15, Chap. I, Sections 2 and 15, U. S. C. A.

2. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

3. The date of the judgment which petitioner seeks to have reviewed is January 29, 1941.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in holding that respondent had presented substantial evidence from which a jury could find that the transactions of the petitioner and his broker constituted gambling under Ill. Rev. Stat. 1939, Chap. 38, Sec. 328.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

1. The Circuit Court of Appeals has decided an important matter of national importance involving transactions on the Chicago Board of Trade, in direct conflict with the Illinois law construing the Illinois Act on Gambling.

2. Has rendered an opinion in conflict with the opinions of other Circuit Courts of Appeal as to what constitutes substantial evidence.

Wherefore it is respectfully submitted that the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

J. ROBERT COHLER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was filed January 29, 1941, and is reported in 117 Fed. (2nd) 249; also in Record, pages 241-247.

The opinion of the Circuit Court of Appeals, on the first appeal to that court, is reported in 101 Fed. 2nd 353.

The District Court did not file a written opinion, the Judgments entered by it being in the Record, pages 219, 221.

JURISDICTION.

(Note Petition (*supra*, p. 4).)

STATEMENT OF THE CASE.

Petitioner entered the grain business in 1910 in Liverpool, England, and since that time has been continuously engaged in that business (R. 74, 162). After coming to the United States, he was employed by Rosenbaum Grain Corporation, and since 1916 he has been a grain merchant in Kansas City, Mo. In 1927 he became and still is associated with B. C. Christopher & Co., of Kansas City, Mo., a large grain house which was and still is a member of various exchanges, including the Chicago and Kansas City Boards of Trade (R. 74-75).

Petitioner bought, sold, stored and shipped all kinds of grain in United States and Canada. He operated and still operates grain elevators in the Middle West and deals in "futures" and "cash" grain (R. 75). In 1931, at time of respondent's "corner", petitioner was a member of the Kansas City Board of Trade.

Thomas Howell, respondent, in 1931 was a large grain operator. Through use of various "dummy" accounts, through falsification of reports to the Grain Futures Administration (R. 48), he was able to acquire approximately 8,000,000 bushels of July 1931 corn and thereby "corner" the July 1931 corn market on the Chicago Board of Trade.

Petitioner's Trades.

The petitioner testified that in 1931 he had two accounts with B. C. Christopher & Company through which he bought, sold, shipped and stored grains of all kinds (R. 75-76). One was a personal account in which he alone was interested, and the other was called a joint account because B. C. Christopher & Company shared in its net profits. However, he, alone made every trade in both ac-

counts, and was the sole arbiter of all trades made (R. 76). In his personal account, B. C. Christopher & Company had no interest whatsoever. *In 1931, at the time of the trades here involved, he owned and operated in his personal account a grain elevator in Dellvale, Kansas, which he used for the purpose of buying, storing and shipping grain* (R. 76).*

The petitioner stated that his net worth in 1931 was approximately $45,000.00 (R. 82; 85). His income in 1931 was between $20,000.00 and $30,000.00 (R. 184); that he had use and facilities for handling the grain which he purchased and the financial ability to carry his trades (R. 74, 75).

On April 17, 1931, petitioner sold 5,000 bushels of Chicago July corn futures (Ex. 149; R. 82), and on May 12, 1931, he sold 45,000 bushels (Ex. 150; R. 83). At the close of business on May 12, 1931, he was therefore short 50,000 bushels. On May 22, 1931, he purchased 5,000 bushels of the same future, and on July 23rd, he purchased an additional 10,000 bushels, so that after these trades and from the close of trading on July 23, 1931, petitioner was short 35,000 bushels in said future (R. 76, 81; Ex. 149, 153; R. 82-84).

Petitioner further testified that when he made these trades, he did not know the respondent or that respondent was operating in the market (R. 80); that the first intimation that petitioner had that something was wrong was the unusual rise in the price of Chicago July corn futures on July 29, 1931, when the price rose 9¾ cents per bushel (R. 79).

Petitioner testified that the reasonable value on July 31st of Chicago July corn futures at Chicago was 50 to 52 cents per bushel R. 81). He claimed a loss on the difference between the price at which he bought Chicago July

*All italics ours, unless otherwise indicated.

corn on July 31st, 1931, at 71⅜ cents per bushel and the price at which he could have bought Chicago July corn at 47¼ cents per bushel had the market not been "cornered," or a difference of 24⅛ cents per bushel on 35,000 bushels amounting to $8,433.75.

Respondent's Defense and the Evidence Relating Thereto.

The respondent pleaded that he was not guilty of monopolizing or attempting to monopolize the trade in corn and that the trades of the petitioner were gambling transactions.

As to the issue of monopoly, the evidence at the last trial concerning the respondent's purchases, sales and withholding of corn from the Chicago July 1931 corn market is exactly the same as was presented in the first trial and upon which issue this Court has already rendered its opinion. (See *Peto* v. *Howell*, 101 Fed. (2d) 353.)

The evidence presented by respondent to prove his affirmative defense of gamling was solely inferential—based on the showing that petitioner, instead of making physical delivery of the corn sold, closed out his trades by offsetting purchases.

The evidence as to B. C. Christopher & Company disclosed that it was and still is a large grain house in Kansas City, Mo., and is a member of the Chicago and Kansas City Boards of Trade (R. 184-85; 75); that it buys wheat, corn, barley, oats and other grains; that it receives consignments from country shippers and handles grain for others (R. 184); that it owns elevators; that it stores grain in warehouses in Kansas City, Wichita, Salina, Topeka, Hutchinson and other southwestern terminals (R. 185); that there is no part of the cash grain business in which it does not engage (R. 186); whenever B. C. Christopher & Co. takes an order for a future trade that trade is confirmed to the customer on a confirmation that the terms

of the contract are that delivery is contemplated (R. 185, 186). This applied to petitioner's transactions with B. C. Christopher & Co. in his personal account (R. 186).

The evidence in respect to the joint account corroborated that given by petitioner. Mr. B. C. Christopher, Jr. testified that petitioner was not a partner of the firm but had a half interest in the joint account (R. 135); that in respect to said account, petitioner made all the transactions without consulting anyone; that they relied entirely on his judgment (R. 135); that the joint account was maintained to merchandise grain (R. 138); that through said account, grain was sold to dealers, processors and feeders throughout the country; that all the cash grain purchased in said account was immediately hedged in the futures market (R. 138).

Mr. B. C. Christopher, Jr. further corroborated petitioner's testimony by testifying that he knew petitioner bought and sold actual corn in his personal account (R. 139); that petitioner owned and operated an elevator in Dellvale, Kansas, in his personal account in 1931 (R. 139); that insofar as petitioner was concerned, in his personal account he was treated the same as any other customer of theirs (R. 136; 139-140).

In respect to petitioner's trade on which suit is brought, the evidence showed that the same were all in the personal account of petitioner and were treated the same by B. C. Christopher & Co. as those made for any other customer (R. 136, 139, 190): that the firm had an interest in petitioner's personal trades only insofar as he was a customer of the firm (R. 139); that they did not know of the particular transactions petitioner made in 1931 (R. 186) any more than they did of any other customer of the firm. The evidence was that when a customer placed an order with B. C. Christopher & Co., they gave it to Lamson Bros., a large Chicago grain house, who have a representative in Kansas City (R. 134-135). All trades given to Lamson

Bros. by B. C. Christopher & Co. for execution are carried by Lamson Bros. as the trades of B. C. Christopher & Co. (R. 135). The name of the customer for whom B. C. Christopher & Co. is handling the trade is not given to Lamson Bros., who know only B. C. Christopher & Co. (R. 117, 135).

After the verdict in favor of the respondent was returned at the last trial, the petitioner made motions in the alternative, pursuant to Rule 50 B of the Federal Rules of Civil Procedure, to have the verdict of the jury set aside and judgment entered for petitioner in accordance with his motion for a directed verdict or for a new trial (R. 214-218). These motions were overruled and judgment entered in favor of respondent from which petitioner appealed. The Circuit Court of Appeals affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS.

The errors which petitioner will urge if the writ of certiorari is issued is that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that respondent had presented substantial evidence from which a jury could find that the transactions of the petitioner and his broker constituted gambling under Illinois Revised Statutes 1939, Chapter 38, Section 328.

2. In holding that the petitioner and his broker were gambling in violation of Illinois Revised Statutes 1939, Chapter 38, Section 328.

3. In holding that the "P" and "S" slips used by petitioner's broker, the manner and method in which they kept their records and their reference to their futures department as the "option department" is evidence of an intent on their part to gamble.

4. In holding that petitioner had no elevator facilities in which to store grain; that he was financially unable to carry trades; and that he did not deliver grain except in a few instances.

5. In failing to follow the Illinois Law construing the statute aforesaid on gambling as expounded in *Ehrlich* v. *Rothschild*, 11 N. E. (2nd) 623; 292 Ill. App. 511; and *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660.

6. In failing to follow the law of other Circuits on the question of what constitutes substantial evidence of an intent to gamble.

7. In affirming on the 29th day of January, 1941, the Judgment of the District Court.

SUMMARY OF ARGUMENTS.

I.

UNDER THE ILLINOIS LAW IN ORDER THAT THE TRANSACTIONS BETWEEN PETITIONER AND B. C. CHRISTOPHER & COMPANY SHALL CONSTITUTE GAMBLING, THERE MUST BE AN AFFIRMATIVE INTENT BY BOTH PARTIES NOT TO DELIVER THE COMMODITIES, BUT TO SETTLE ON DIFFERENCES ONLY WHICH INTENTION MUST BE MUTUAL AND DISCLOSED.

II.

A.

PETITIONER'S TRANSACTIONS ARE PRESUMED TO BE LEGAL AND THE BURDEN OF PROVING THEM TO BE GAMBLING CONTRACTS RESTS UPON RESPONDENT WHO MUST PROVE THEIR ILLEGALITY BY SUBSTANTIAL EVIDENCE.

B.

THE FACT THAT MOST OF PETITIONER'S FUTURES TRADES WERE CLOSED OUT BY OFFSETTING PURCHASES IS NOT SUBSTANTIAL EVIDENCE OF AN INTENTION ON THE PART OF B. C. CHRISTOPHER & COMPANY OR PETITIONER TO GAMBLE.

III.

A.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT B. C. CHRISTOPHER & CO. INTENDED TO GAMBLE. ON THE CONTRARY THE EVIDENCE AFFIRMATIVELY SHOWED THEIR INTENTION NOT TO GAMBLE.

B.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT PETITIONER, HIMSELF, INTENDED TO GAMBLE. ALL THE EVIDENCE BEARING ON THE QUESTION OF HIS INTENT AFFIRMATIVELY SHOWED THAT HE DID NOT INTEND TO GAMBLE.

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE "P" AND "S" SLIPS USED BY PETITIONER'S BROKER, THE MANNER AND METHOD IN WHICH THEY KEPT THEIR RECORDS AND THEIR REFERENCE TO THEIR FUTURES DEPARTMENT AS THE "OPTION DEPARTMENT" IS EVIDENCE OF AN INTENT ON THEIR PART TO GAMBLE.

ARGUMENT.

I.

UNDER THE ILLINOIS LAW IN ORDER THAT THE TRANSACTIONS BETWEEN PETITIONER AND B. C. CHRISTOPHER & COMPANY SHALL CONSTITUTE GAMBLING, THERE MUST BE AN AFFIRMATIVE INTENT BY BOTH PARTIES NOT TO DELIVER THE COMMODITIES, BUT TO SETTLE ON DIFFERENCES ONLY WHICH INTENTION MUST BE MUTUAL AND DISCLOSED.

The decision of the Circuit Court of Appeals is directly contrary to the decision of the Illinois Courts in respect to what constitutes gambling between broker and customer under the Illinois Statute. Moreover, it is contrary to the decisions of other Circuits on the question as to what constitutes such substantial evidence of gambling on supervised exchanges as to warrant submitting that issue to a jury.

Since the Chicago Board of Trade is the largest grain exchange in the world and approximately 90% of all trades in grain in the United States are executed thereon, the decicision of what constitutes gambling under the Illinois law on such a Board is of national importance in view of the fact that the Illinois law governs such transactions. See *Hoyt* v. *Wickham*, 25 Fed. (2nd) 777, 779; *Lyons Milling Co.* v. *Goffe and Carkener, Inc.*, 46 Fed. (2nd) 241, 245.

The Illinois Statute on gambling is Chap. 38, Sec. 328, (Ill. Rev. Stat. 1939) which provides:

> "Whoever contracts to have or give himself or another the option to sell or buy, at a future time, any grain, * * * where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting

> therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, * * * or corners the market * * * shall be fined * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

The two most recent leading cases in Illinois construing this Statute are *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623; 292 Ill. App. 511 and *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660. The Court said at page 663 of the last mentioned case:

> "* * * In order to constitute transactions gambling, *both parties* must intend or understand that settlement shall be had, not by receipt or delivery of such commodity but by payment, *only*, of the differences in the price thereof, * * *."

The latest pronouncement of the Illinois law on the construction of the statute under which respondent contends petitioner's transactions were gambles, is the case of *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623; 292 Ill. App. 511, *where the sole question involved was the same as is involved in this case*, namely, whether the party contending the grain contracts were gambling "produced sufficient evidence to warrant submission of the cause to the jury."

In the Ehrlich case, at page 628, the Court said:

> "* * * In order that the agreement between the broker and his customer shall constitute gambling under the statute, there must be an *affirmative* intent by the parties not to deliver commodities or securities but to settle on differences only. *The intention must be mutual and be disclosed;* * * *."

and at page 627, the Court stated:

> "Any circumstances tending to show the real intention of both parties is admissible, but it is not sufficient to present evidence tending to show the intention of only one of them. It requires two guilty minds to make a contract in violation of the statute. * * *"

In the "Restatement of Contracts" cited extensively and relied upon by the Court in the Ehrlich case, the authors state at Chapter 18, Section 523, page 1014:

> "Sec. 523. BARGAIN TO SETTLE FOR DIFFERENCES IN MARKET PRICES. 1. A bargain purporting to be for the purchase and sale is a wager *if it is part of the bargain* that no actual delivery of the subject matter shall be made and that settlement between the parties shall be made on the basis of differences in market prices. *But an undisclosed intention of one or both parties to a bargain does not invalidate it.*"

By the way of example, the authors of "Restatement of Contracts," Chapter 18, Section 523, at page 1016, illustrate their text as follows:

> "(Illustration.) 3. A, a stock broker, receives and accepts from B an order to purchase 100 shares of stock. B deposits a margin to secure the account. B does not expect to take delivery of the shares; he has dealt with A before and has then settled his account by payment of the difference between the market price at the time of settlement and at the time of the original transaction; and he expects to do so again. *A also expects this, but makes no agreement to this effect.* The bargain between A and B for purchase and sale is not a wager; nor would it be if B, unknown to A, erroneously supposed that A agreed to settle by payment of differences."

See also "Illinois Annotations" to the Restatement of Contracts, Sec. 523, page 274.

As pointed out by the illustration, even if the broker *knows* of the customer's intention to gamble *"but makes no agreement to this effect,"* the transaction is legal.

In *Hoyt* v. *Wickham,* 25 Fed. (2d) 777, at p. 779, the Court said:

> "The fact that a customer does not intend to receive or deliver the actual commodity bought or sold does not make his trades gambling transactions if his intention in that respect is not disclosed to the brokers.

Browne v. *Thorn*, 272 Fed. 950; affirmed 260 U. S. 137; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109; *Lamson Bros.* v. *Mensen*, 187 Iowa 972-975 * * *. The Illinois cases are all to the same effect."

Petitioner contends that *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623, 292 Ill. App. 511, is directly in point on the question of what the Illinois Law is and shows conclusively under the facts in the instant case that there was not sufficient evidence to warrant the submission of the issue of gambling to a jury. The Circuit Court of Appeals entirely disregarded this latest pronouncement of the Illinois Law on this point.

II.

A.

PETITIONER'S TRANSACTIONS ARE PRESUMED TO BE LEGAL AND THE BURDEN OF PROVING THEM TO BE GAMBLING CONTRACTS RESTS UPON RESPONDENT WHO MUST PROVE THEIR ILLEGALITY BY SUBSTANTIAL EVIDENCE.

It must be borne in mind that it did not devolve upon petitioner to prove the legality of his contracts. Gambling is an affirmative defense and necessitated proof by respondent that both the petitioner and his broker intended at the time the contracts were entered into that they be settled only by payment of market differences and that such intention was mutual and disclosed.

In *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at 490, the Court, in construing the Illinois Statute on Gambling, stated:

> "A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of 'differences,' rests with the party making the assertion. * * *"

See also *Irwin* v. *Williar*, 4 Sup. Ct. 160; 110 U. S. 499 at 507; *Johnson* v. *Milmine*, 150 Ill. App. 208, 222, 223.

In order that the presumption of legality be overcome, nothing less than substantial evidence will avail.

In *Dustin Grain Co.* v. *M'Allister,* 296 Fed. 611, at page 613, the following language was used:

> "* * * And when, at the close of the evidence, there is no substantial evidence to sustain a finding or verdict for the defendant upon a decisive issue in a case, the trial court should instruct the jury to find that issue for the plaintiff."

See also *Ponder* v. *Jerome Hill Cotton Co.,* 100 F. 373 at 377 and *Gettys* v. *Newburger,* 272 F. 209 at 219-220.

A bit of evidence, or some evidence, upon which a jury might have found the issue in favor of defendant is not enough.

B.

THE FACT THAT MOST OF PETITIONER'S FUTURES TRADES WERE CLOSED OUT BY OFFSETTING PURCHASES IS NOT SUBSTANTIAL EVIDENCE OF AN INTENTION ON THE PART OF B. C. CHRISTOPHER & COMPANY OR PETITIONER TO GAMBLE.

Respondent urged most strongly and the Circuit Court of Appeals accepted as evidence of an intent to gamble the fact that most of the "future" transactions between petitioner and his broker, B. C. Christopher & Company, were closed out before the time for delivery by offsetting purchases rather than by the actual physical delivery of the grains dealt in. But this argument is entirely without merit; for the fact that few or no deliveries are made on future trades by millers, processors or those in the grain business does not constitute substantial evidence of an intent to gamble.

The leading case, *Board of Trade* v. *Christie,* 198 U. S. 236, which holds at page 248 that "setoff has all the effects of delivery," while referring to dealings between members of the Exchange, was soon applied by the courts to include

dealings between customer and broker. See *Browne* v. *Thorne,* 260 U. S. 137; *Cleage* v. *Laidley,* 149 Fed. 346; *Mullinix* v. *Hubbard,* 6 Fed. (2d) 109; *Gettys* v. *Newburger,* 272 Fed. 209.

The great and ever increasing influence of the future trading market of the Chicago Board of Trade on our entire agricultural marketing processes was recognized by the courts which began to take a more realistic attitude toward Exchanges and which refused to consider the economic functions performed by the Exchange in an "intellectual vacuum."

It is well known that those in the grain business who hedge in the futures market the actual grain they deal in seldom, if ever, make or receive physical delivery on their future trades but close them out by offsetting purchases or sales, as soon as the actual grain is disposed of.

As stated in "Commodity Exchanges" by Baer & Woodruff (1929 Edition), at page 95:

> "Futures which are bought or sold as hedges are covered in the vast majority of cases by an offsetting futures sales or purchase. *Delivery is exceptional.* This is a normal condition and in line with the purpose of a hedge."

In the Report of the Chief of the Commodities Exchange Administration, 1939, to the Secretary of Agriculture, dated September 25, 1939, in Table 11, on page 10, it is shown that those who engage in hedging are generally short. In Table 14 on page 12, it shows that during the year 1939, out of total future trading in corn on the Chicago Board of Trade amounting to 1,450,607,000 bushels, only 1.8% were settled by delivery. The Chief of the Commodities Exchange Administration states in this Report, on page 12:

> "This very small percentage of future contracts settled by delivery of the actual commodity does not indicate that future contracts are not related to the actual commodities. * * * *It is to the advantage of*

> *the grain producer, dealer, and processor that futures contracts can be closed out by offset. * * * In the larger futures markets it is only when manipulation, squeezes, or congestion make delivery difficult that any considerable percentage of futures contracts are settled by delivery."*

In "Legal Status of Trading in Futures," 32 Ill. Law Review 155, H. S. Irwin, of the Commodities Exchange Administration, states at page 156:

> "* * *. In fact, delivery upon contracts has come to be a very minor function in the more highly evolved types of futures trading, * * *. *Thus, the making of a futures contract to buy or sell upon an organized exchange is very different from the making of a private contract in which it is stipulated that delivery will not be made or required. On an organized market, a definite act is required on the part of the holder of a contract if he wishes to avoid the making of delivery on that contract."*

That delivery is, in fact, seldom made is evidenced by the fact that less than 2% of all future trading on the Chicago Board of Trade running into billions of bushels yearly are settled by actual physical delivery.

In *Gettys* v. *Newburger*, 272 Fed. 209, at pages 219, 220, also based on the Christie case, the Court said:

> "The fact that much the larger portion or all of the dealings of the plaintiff or of the defendant or of the dealings on the New York Cotton Exchange were or are settled and discharged without delivery or receipt of any property *does not constitute substantial evidence* to prove what portion of them was tainted with the pernicious intention and what portion of them was not so tainted * * *."

In *Hoyt* v. *Wickham*, 25 Fed. (2nd) 777, at page 779, the Court said:

> "The court suggested that in its opinion the burden was upon defendant to prove that the transactions were gambling contracts, and that defendant had failed

to carry this burden. Defendant's evidence was to the effect that when, for example, he bought corn for September delivery, he sold an equal amount for September delivery before the 1st of September. He says:

'I did that to close the deal. By selling a future against it they couldn't deliver any grain to me. And the reason they couldn't deliver any was because when I bought a certain amount I sold exactly the same amount before the date for delivery arrived. I sold against it to close the deal out.'

"*In other words, that it was never his intention to deliver or receive any of the grain involved in these transactions. This falls far short* of establishing the existence of a gambling contract, whether under the law of Iowa, *Illinois*, in federal jurisdictions generally or the provisions of the Grain Futures Act * * *."

As the Court said in *Cleage* v. *Laidley*, (based on the Christie case) 149 F. 346, at page 352:

"Nor does the fact that the defendant dealt in 14,000,000 bushels of grain, and that the contracts for more than 98 percent of this property were settled by set-off or by ringing off and by the payment of differences, demonstrate an illegal intention. Since the intention to settle in this way is not unlawful; the fact that contracts were so settled, cannot evidence an illegal purpose * * *."

Not only did the petitioner testify that he intended to make delivery, but so did his broker, the other party to the transaction. The only one who asserted that petitioner's trades were gambles, was the respondent, a third party to the transactions, to escape the consequences of his illegal monopoly.

Finally, the Supreme Court of Illinois, in *Riordon* v. *MaCabe*, 341 Ill. 506, 173 N. E. 660 said at p. 664:

"* * * and there is no legal or moral objection to the purchase or sale of commodities for future delivery even though the parties to the contract intend that if it be to their advantage they will either sell or

> buy for future delivery a sufficient amount of such commodity, so that when one is set off against the other, they shall not suffer loss. * * *"

Thus petitioner has shown that petitioner's contracts are presumptively legal and the burden of proof was upon defendant to show by substantial evidence that both petitioner and his broker intended to gamble with each other and agreed so to do. The fact that petitioner closed out his trades by offsetting contracts instead of making physical delivery is not substantial evidence to prove the contracts illegal.

III.

A.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT B. C. CHRISTOPHER & CO. INTENDED TO GAMBLE. ON THE CONTRARY THE EVIDENCE AFFIRMATIVELY SHOWED THEIR INTENTION NOT TO GAMBLE.

Is there such substantial evidence in the record that petitioner and his broker, B. C. Christopher & Company, intended to gamble, and that such intention was mutual and disclosed so as to warrant the submission of this issue to the jury?

Petitioner contends that far from there being substantial evidence that B. C. Christopher & Co., intended to gamble, the evidence affirmatively shows their intent not to gamble.

To aid in determining with what intent parties deal on Boards of Trade, the Courts have set forth certain indicies.

In *Ehrlich* v. *Rothschild*, 292 Ill. App. 511, 11 N. E. (2d) 623 it was stated at p. 628:

> "* * *; and in considering whether the broker and his customer intended a settlement by payment of differences, the court may consider various circumstances, such as lack of facilities of the buyer to accept delivery of a commodity in the quantities ordered

(citing cases). Also the fact that the customer is not in a business reasonably requiring the purchase or sale of the particular commodity in the particular quantities (citing cases) * * *. Also the previous dealings between the parties (citing cases) * * * or the financial inability of the customer (citing cases) * * *."

As far as any written evidence of intention to deliver, the evidence shows that on every order of sale which petitioner made through B. C. Christopher & Co., it is specifically provided:

> "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor * * *. (Ex. 149, 150, 151, 152, 153; R. 82, 84.)

Nowhere in the record did anyone connected with B. C. Christopher & Co., testify of an intent that no delivery should be made. Quite to the Contrary, Mr. James K. Christopher, partner in the firm since 1922, testified that delivery was intended (R. 185, 186).

The evidence shows that B. C. Christopher & Co. accepted and made delivery of grain on futures contracts about every delivery that came along (R. 180). The firm received grain at Chicago in settlement of its futures contracts. The deliveries in such cases were made by warehouse recepits (R. 189). Quite frequently there were deliveries between petitioner and B. C. Christopher & Co., in the joint account, both in Kansas City and in Chicago (R. 189).

Petitioner frequently received and delivered grain in Chicago for the joint account (R. 189). Sworn answers to written interrogatories propounded by the respondent in this case show that both B. C. Christopher & Co. and petitioner were making physical delivery of thousand of bushels of corn and other grain in their joint account, to some of

the largest millers, processors and manufacturers in the country.*

In respect to the financial ability of B. C. Christopher & Company to handle petitioner's trades, respondent who had the burden of proof offered no evidence at all. The evidence shows that B. C. Christopher & Co. was an old established grain and commission house in Kansas City, which had been in business for many years, and held memberships on the Chicago, Kansas City, Hutchison, Salina, Atchison and St. Joseph (Mo.) boards of trades, and also on the St. Louis Mercantile Exchange (R. 162).

The evidence affirmatively shows that B. C. Christopher & Co. stored grain and had access to elevators and warehouses in Kansas City, Wichita, Salina, Topeka, Hutchison and all the Southwestern terminal lines, and that in addition they own one elevator and lease it to petitioner to operate (R. 185).

The evidence discloses that they buy wheat, corn, barley, oats and other grains; that they receive consignments from country shippers and handles grain for others (R. 184); that they own an elevator; that there is no part of the cash grain business in which they do not engage (R. 186). Not only did they have use for the grain but their business is nothing else but dealing in actual grain.

Did B. C. Christopher & Co. know, or should they have known of any illegal intent, if any there was, on the part of petitioner to gamble? There is not one bit of testimony in the record which indicates that they had any knowledge or should have had any knowledge of any intent on the part of petitioner to gamble, even if it were petitioners

* The sworn answers of petitioner to respondent's interrogatories 32 and 34 requesting names of firms, if any, to whom petitioner sold actual corn in 1931 and preceding years lists among others such firms as: Washburn-Crosby; Randolph Milling Co., Purina Mills; Corn Products Refining Co.; Southard Feed Co.; Missouri Poultry Farms; Shreveport Grain Co.; Akard Mills; Bowen-Oglesby Milling Co., and many others. It is significant to note that respondent did not take the depositions of the many firms listed to determine whether petitioner was selling them actual grain as sworn to by him.

intent to do so. They knew that petitioner was a member of the Kansas City Board of Trade and had been since 1926 (R. 185); they knew that he had spent most of his life in the grain business; they knew that he bought and sold grain (R. 135, 1938); they knew that he owned and operated grain elevators (R. 139); *that in 1931, at the time of his trades, he owned and operated in his personal account, a grain elevator in Dellvale, Kansas (R. 135, 184)*; they also knew that in connection with the joint account over which petitioner exercised complete control and was interested with them, they sold grain to hundreds of millers and processors throughout the country.

So far as petitioner's financial condition was concerned, they knew that he had been successful with them and that there had been substantial profits in the joint account from 1926 to 1931 (R. 137); and they knew that in the year 1931, petitioner's net income was from twenty thousand to thirty thousand dollars (R. 184).

If the transactions in this case are held to be gambling, then all trades on the Chicago Board of Trade must be denominated as gambling contracts. As was said by the Supreme Court in *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at page 488:

> "The view taken by the Circuit Court of Appeals in regard to this case was that the contracts were void as being in violation of the terms of the Illinois Statute which are set forth in the margin. It is a very far-reaching decision, and if followed would invalidate most transactions of every stock exchange in the country 'for the account.' We are unable to agree with the opinion of the Court on this question."

There was certainly no substantial evidence which would warrant the submission of the issue of gambling to the jury. On this ground, alone, the Trial Court erred in overruling petitioner's motion for directed verdict on the issue of gambling. The Circuit Court of Appeals has disregarded the law as set forth in *Ehrlich* v. *Rothschild*, 11

N. E. (2d) 623; 292 Ill. 353 and the Federal cases above cited and erred in affirming the judgment of the District Court.

B.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT PETITIONER, HIMSELF, INTENDED TO GAMBLE. ALL THE EVIDENCE BEARING ON THE QUESTION OF HIS INTENT AFFIRMATIVELY SHOWED THAT HE DID NOT INTEND TO GAMBLE.

Petitioner contends that inasmuch as B. C. Christopher & Co. did not intend to gamble, a discussion as to petitioner's intent is superfluous as having no bearing on the ultimate question of the propriety of the trial court's ruling on the motion for directed verdict.

However, the evidence with regard to petitioner's intent is so clear and convincing that he did not intend to gamble, that petitioner eagerly takes up the question of his intention.

The attention of the Court is first directed to the matter of the financial ability of petitioner to handle his transactions. In 1931, he owned an elevator outright (R. 135). His membership on the Kansas City Board of Trade was worth $12,000.00 (R. 84) and his home was valued at $10,000.00 (R. 85). He had a credit on the books of B. C. Christopher & Co. for $8319.43 (Respondent's Ex. 3, R. 152), on the day he made his largest sale of 45,000 bushels of corn, namely, May 12, 1931. He also had $4,500.00 in cash in the First National Bank of Kansas City and $3,000.00 in stocks and bonds. At the time that his original sales were made in 1931, petitioner was worth about $45,000.00 and owed nothing (R. 82). Petitioner's transactions with B. C. Christopher & Co. had been successful, and every year, from 1926 to 1931, without exception, there had been substantial profits, part of which he withdrew, and part of which he left to his credit (R. 137, 139). His net income in 1931 was between $20,000.00 and $30,000.00 (R. 184). None of

his trades were ever closed out against his will (R. 137, 190).

Petitioner now turns to the question of his facilities to handle the corn. He owned, in his personal account, aside from the elevator he leased in his joint account, a grain elevator at Dellvale, Kansas (R. 76). He had the use of the Milwaukee and Eagle Elevators in Kansas City in which he stored grain in the name of B. C. Christopher & Co. (R. 88, 142, 195, 196).

Petitioner's statement as to his intent to deliver is borne out by his actions. It should be remembered that the petitioner was a grain merchant in the grain business for thirty years, part of the time with the Rosenbaum Grain Corporation in Chicago (R. 74). He testified that on July 1, 1931, over a million and a quarter bushels of grain was delivered in Chicago in fulfillment of future contracts, and that thereafter there were large receipts of corn in Chicago every day from country points; that all this indicated to him that the large supply of corn would tend to lower the price and make it more advantageous for him to deliver corn on track at Chicago during the last three days of the month (R. 78, 79), which was permitted by the rules of the Board of Trade for Chicago July future contracts in 1931 (R. 125). However, as the evidence shows, the price sky-rocketed on July 29th, and petitioner then learned, for the first time, that the tremendous stocks which had been flowing into Chicago all during the month of July were concentrated in the hands of respondent (R. 79) and that then he tried to purchase 35,000 bushels of corn in Chicago and Iowa but was unable to do so (R. 80), nor to ship it in from Kansas, as there was not sufficient time (R. 80) and that therefore there was nothing he could do but pay the price for off-setting futures on July 31st, which price was fixed, dictated and controlled by respondent.

This leaves for our consideration in determining the intent of the petitioner, two indicia, namely, *the business*

of the petitioner, and his use or lack of use for the commodity dealt in. As these two are so connected with each other, we shall discuss them as one.

Petitioner was, and still is, a grain merchant as has already been set forth (R. 75). Grain was the only thing petitioner knew. It was his life's occupation, the means by which he earned his livelihood. Petitioner had no other business. His activities in merchandising grain consumed his entire working day.

Petitioner had sold hundreds of thousands of bushels of grain to millers and processors.

Respondent relied heavily in his Brief in the Circuit Court of Appeals on the case of *Dickson* v. *Uhlman,* reviewed on certiorari by the Supreme Court and reported in 53 Sup. Ct. 362; 288 U. S. 188 (Justices Stone, Butler and the late Justice Cardozza dissenting). However, that case is distinguished, in the words of the majority opinion itself. Of petitioner, it can not be said as this court stated in the Uhlman case, at page 195:

> "* * * Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrolton, *two were farmers, two were clothing merchants, and one was an ice dealer. These defendants, who were not in the grain business, who had never traded on a grain exchange, and who had no facilities for handling grain,* purported to buy and sell in amounts up to 50,000 bushels in a single transaction. * * *"

In *Ehrlich* v. *Rothschild,* 11 N. E. (2d) 623; 292 Ill. App. 511, decided in 1937, a comprehensive review of the Illinois law concerning trading on the Board of Trade, is made. In that case, plaintiff, a practicing lawyer, brought suit against the defendant to recover money lost in alleged gambling transaction.

The sole question for consideration was whether sufficient evidence was produced to warrant the submission of

the case to the jury, being the identical question raised in the case at bar.

Ehrlich testified that he had bought stock and grain on the exchanges through the defendant brokers for some time prior to June, 1933, at which time defendants delivered a check to him in settlement of prior transactions. Plaintiff testified: "I told him (Rothschild) that I was through gambling for all time. 'You remember I told you a year and a half ago I never wanted to see a market as long as I live' "; that Rothschild spoke to Ehrlich some ten or twelve times during the following six weeks and wanted Ehrlich "to take a flyer," and as a result thereof, Ehrlich did make trades in both wheat and stocks.

He further testified that he "never saw any of the wheat; that he would not know what it would look like if he saw it; that he had no warehouse in which to store the wheat and didn't need any in his business as a lawyer."

The Appellate Court, in holding that the contracts were legal and that there was not sufficient evidence to warrant submitting the issues to a jury, stated at page 627:

> "Plaintiff testified that he himself did not intend to accept delivery, but he does not, anywhere in his testimony, say that Rothschild was informed by him *or that he agreed to* any such method of doing business * * *. The burden of proof was upon him. It was for him to show that *the defendants intended to enter into a gambling transaction* * * *.
>
> "Any circumstance tending to show the real intention of both parties is admissible, but it is not sufficient to present evidence tending to show the intention of only one of them. *It requires two guilty minds to make a contract in violation of the statute* * * *."

The Court continued:

> "* * * If we apply the rule stated in these cases to the facts before us, we find no testimony that either of the parties intended that the transactions should be settled by payment of differences. There is, as to

the grain (but not as to the stock) evidence that the customer could not reasonably require or conveniently use the stock or grain to the amount purchased. Previous dealings between the parties indicated purchases and deliveries with settlement concerning which no complaint was made. The deposits of margin made seem to have been ample. Most important, and controlling, the plaintiff was financially able to carry all of the transactions * * *. Upon the whole record, we are of the opinion the plaintiff (Ehrlich), failed to introduce evidence from which the jury could reasonably find that both plaintiff and defendants intended to enter into a gambling contract * * *."

In the light of these decisions, in the light of the record in the case at bar, we submit that this Court should hold that as a matter of law, petitioner was not gambling.

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE "P" AND "S" SLIPS USED BY PETITIONER'S BROKER, THE MANNER AND METHOD IN WHICH THEY KEPT THEIR RECORDS AND THEIR REFERENCE TO THEIR FUTURES DEPARTMENT AS THE "OPTION DEPARTMENT" IS EVIDENCE OF AN INTENT ON THEIR PART TO GAMBLE.

In rendering the opinion in the last appeal, the Court disposed of the gambling issue by stating that inasmuch as the jury found for the respondent, the judgment of the District Court should be affirmed. It did not consider the evidence to determine whether or not it was of such substantial nature as to warrant submitting the case should have gone to the jury. It did not even refer to or comment upon the latest Illinois decision, namely, *Ehrlich* v. *Rothschild,* 11 N. E. (2d) 623; 292 Ill. App. 511, relied upon by petitioner and quoted extensively in petitioner's brief.

The only evidence respondent presented which was referred to by the Circuit Court of Appeals as inferentially indicating an intent on the part of B. C. Christopher &

Company to gamble were certain "P" and "S" slips, the method by which the ledger accounts of B. C. Christopher & Company were maintained, the method by which the ledger accounts of Lamson Brothers through whom the trades were made on the Chicago Board of Trade were kept, *and the fact that B. C. Christopher & Company referred to their future trading department as the "Option Department".*

We respectfully submit that the Circuit Court of Appeals must not be fully acquainted with the manner and method in which the grain trade is now conducted under the supervision of the Commodities Exchange Administration on supervised exchanges.

In respect to the "P" and "S" slips used by B. C. Christopher & Company, they are the usual kind used by most grain houses in the grain trade. The Court apparently adopted the respondent's argument, not supported by any evidence, that the "P" and "S" slips were highly significant of an intent to gamble on the part of B. C. Christopher & Company. The respondent in his brief had stated:

> "It is highly significant that the only invoice ever sent to a customer (by B. C. Christopher & Company) receives its name from the words "purchase and sale". That indicates that the invoice contemplated the purchase price and the sale price and billing the customer for the difference."

Not a single person in the City of Chicago, the largest grain market in the world, took the stand to testify to such a ludicrous statement.

If this is evidence of an intention on the part of a grain broker to gamble, then no legitimate grain broker in the United States would be immune from such a characterization.

In explaining the types of records employed in typical futures transactions by grain houses conducting business on

supervised exchanges under the supervision of the Commodities Exchange Administration, Mr. J. M. Mehl, Assistant Chief of the Commodities Exchange Administration, in Official Bulletin No. 151 of the United States Department of Agriculture entitled "Hedging in Grain Futures" states at page 15:

> "* * * (Immaterial portions omitted.) To resume the John Doe illustration, when the transaction is closed by buying back the future previously sold, the purchase order follows the same routine as that described for the selling order. The same procedure is followed in transmitting it from Omaha, Nebraska, to the Chicago wheat pit. *The same kind of confirmation goes forward, followed by what is known as a P & S Slip, being merely a statement of account showing both sides of a transaction together with the net result credited or charged, as the case may be, to the customer's account.*"

On page 16 of the Bulletin, there is a copy of a "P" and "S" form which, if the Court will examine it, will find is almost identical with the P & S slip employed by the B. C. Christopher & Co. (R. 198), which defendant concludes "are consistent only with the practice of settling on differences." There is absolutely no foundation to respondent's contention or the court's inference that the "P" & "S" slip indicates an intention on the part of B. C. Christopher & Co. to gamble.

As the manner and method in which B. C. Christopher & Co. and Lamson Brothers kept their records. These are kept the same as by other grain houses transacting business on the Chicago Board of Trade under the supervision of the Commodities Exchange Administration. The Court commented in its last opinion that the future ledgers account of B. C. Christopher & Co. as well as that of Lamson Brothers indicated that the various trades were closed out on the records by mere offsets and that the ledgers were not adapted to settlements by actual delivery, apparently in-

ferring that this constitutes evidence indicating an intent on the part of B. C. Christopher & Co. to gamble.

Lamson Bros. and B. C. Christopher & Co. are both members of the Chicago Board of Trade and are old established firms; all of their records are subject to the supervision of the Commodities Exchange Administration and must be kept in the manner and form prescribed by the United States Department of Agriculture. See title 7, Chapter 1, Section 6 G of the Commodities Exchange Act.

There is no evidence in the record to show that the records of B. C. Christopher & Co. or Lamson Bros. are not the usual ordinary kind employed in the grain business by grain houses who are members of the Chicago Board of Trade. In fact, one of the respondent's own witnesses, an accountant employed by Arthur Andersen & Co., accountants for some of the largest grain houses on the Chicago Board of Trade, testified on cross-examination:

> "All figures I have testified were taken from photostats of Mr. Peto's and B. C. Christopher's records. The exhibits I started from appear to be correct records. They record all transactions in the usual manner which concerns of that kind do business. They are *perfectly normal* * * *." (R. 180-181.)

It is significant to note that L. A. Fitz in charge of the Chicago office of the Commodities Exchange Administration, Paul Mehl, its Senior Economist, and Arthur W. Mayo, its Assistant Chief Accountant, were all called to testify on behalf of petitioner. If there was any merit to the contention that the records of B. C. Christopher & Co. and Lamson Bros. were not of the usual type kept in the manner prescribed by the Commodities Exchange Administration, or kept in a manner indicating an illegal purpose, this fact could have been easily brought out by the respondent.

The method adopted by B. C. Christopher & Co. and Lamson Bros. in off-setting on its books the trades of the

respective customers is identical with that set forth by Mr. Mehl in his booklet, "Hedging in Grain Futures", Official Bulletin No. 151 U. S. Department of Agriculture. As he says, simplified methods of accounting are necessary because trading on the Chicago Board of Trade runs into billions of bushels yearly. (Page 15)

> " * * * In this highly developed process of settlement, which is absolutely necessary with the large volume of business involved, it will be seen that so far as it concerns the individual customers of any one house who have bought and sold in equal amounts, the house being responsible for the net results in any event, there is no need of delaying settlement. In the end results are the same if purchases and sales of single customers are merely *off-set* one against the other and settlement made by money difference at the time.
>
> "This explanation appears somewhat lengthy, perhaps, and elementary to an unnecessary degree. *It is believed, however, that it will be of assistance to many in better understanding just what takes place and why said board of trade transactions and practices take on strange aspects only because of the methods necessary to large-scale handling and the elimination of all unnecessary detail.*"

There is no evidence upon which the respondent bases his charge, adopted by the Circuit Court of Appeals in its last opinion that "the practice (*off-setting*) followed by Lamson Bros. and B. C. Christopher * * * leads to the inevitable conclusion that it was intended that the transactions be settled on differences."

The extent to which the Circuit Court of Appeals apparently adopted the fallacious arguments and inferences of the respondent is nowhere better illustrated than in that portion of its opinion wherein it stated at page 251:

> "The details of the transactions between plaintiff and his broker over a long course of time discloses that his grain deals were carried on the records of the broker's 'Option Department' * * *."

In his brief, respondent had argued that the futures records of B. C. Christopher & Company were kept in the "option department" and that the ledgers of petitioner's personal trades in futures were kept thereon. The respondent then concluded that options in grains are expressly declared illegal under the Illinois Statute.

But the true fact with reference to the word "options" is as stated in *Nash-Wright Co.* v. *Wright,* 156 Ill. App. 243, at 248, 249:

> "* * * But as appears * * * the word 'option' is used in two different senses. It is used among the members of the Board of Trade usually coupled with the name of the month in which grain is deliverable *as a trade name,* and when so used, the sole option in the matter is the option which the seller has to deliver the grain purchased at any time during such specified month. * * *."

See also 83 A. L. R. 563 to the same effect.

It is apparent, therefore, that the word "options" is used in the grain trade merely as a synonym for "futures". It seems fantastic to say the least that B. C. Christopher & Company would maintain an illegal gambling department in its business and openly label it as such.

It is indeed difficult to understand how the Court came to the conclusion that it did as shown by its comments in respect to petitioner's financial ability to carry his trades and its remarks to the effect that petitioner "had no elevator facilities of his own * * *." Petitioner personally owned and operated a grain elevator at Dellvale, Kansas, at the time of these transactions (R. 76). This appeared in petitioner's brief a number of times. In fact, respondent at no time disputed it. In addition, petitioner actually operated a grain elevator for B. C. Christopher & Co. in his joint account, which fact is also not disputed. Notwithstanding the Circuit Court of Appeals states that petitioner had no elevator facilities (page 252 of opinion).

The Court further stated that petitioner was 50,000 bushels short of July corn which would have necessitated an expenditure of $31,006.25. The amount of the expenditure would be correct if the premise was a fact. However, petitioner had previously closed out 15,000 bushels of Chicago July corn and was only short 35,000 bushels (R. 76, 81; Ex. 149, 153; R. 82-84). This is also not disputed. Therefore, even if petitioner had to pay cash for every bushel of corn which he sold, he would require only $21,500.00. The trades in wheat referred to by the Court showed that he had a credit of approximately $1700.00. The evidence showed that petitioner owned his own home clear, title to which was in himself and his wife, valued at $10,000.00 (R. 85). He had a credit on the books of B. C. Christopher & Co. of $8,319.43 at the time of his last sale of July 1931 corn on May 12, 1931 (R. 152). He had $4500.00 in cash in the First National Bank of Kansas City and $3,000.00 in stocks and bonds. This alone totals $23,500.00. In addition, he owned a membership on the Kansas City Board of Trade valued at $12,000.00, to which membership, although in his wife's name, petitioner had the full beneficial ownership and used the same constantly in his business (R. 85). In addition, the 35,000 bushels of corn had a loan value of approximately $15,000.00 for which petitioner apparently is not given any credit.

As set forth in the case of *Riordon* v. *McCabe,* 173 N. E. 660, 341 Ill. 506, the grain dealt in had a loan value equal to 75% of the market price. Not only was petitioner financially able to carry the 35,000 bushels of July corn which he sold short but was financially able to carry several times that amount.

The fact is, as shown by the record in this case, when respondent applied the "squeeze" during the last three days of his corner and compelled petitioner to pay the abnormally high price of 72½¢ per bushel, petitioner did not default but promptly paid.

The Court quoted from respondent's brief that petitioner had made apparent contradictions in his testimony as to *whether* he *owned* corn at the time of his transactions and whether he intended to deliver such specific corn. In the first place, even if this were true as showing an intent on petitioner's part not to deliver, it would not mean that B. C. Christopher & Company entered into an illegal agreement with petitioner.

In the second place, it is immaterial whether petitioner owned any corn at the time of his trades or whether he intended to deliver that specific corn. As stated in *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at 493 :

> "* * * The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption, because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed. * * *."

Petitioner earnestly asks the Court to read the record with regard to the so-called conflicting testimony (R. 85-99). The attorney for the respondent was so determined that petitioner should not be given an opportunity to explain statements made years before at the former trial that even the District Court had to intervene (R. 86-87).

Conclusion.

It is therefore respectfully submitted that the Circuit Court of Appeals has disregarded the Illinois law as well as the law of other circuits in affirming the judgment of the District Court and its judgment should be reversed; and to that end a writ of certiorari should be granted.

J. Robert Cohler,
Attorney for Petitioner.

APPENDIX

APPENDIX.

Although the Circuit Court of Appeals in its opinion referred to and quoted an extract from a leading Illinois case, *Riordon* v. *McCabe,* 341 Ill. 506, it seems clear that it decided the case at bar contrary to the Illinois law as expounded by that decision.

McCabe was a farmer; he bought and sold futures during 1919, 1920 and 1921. His transactions were speculative; he was not in the grain business nor did he have use for the grain dealt in.

His total purchases and sales up to March 21, 1921, aggregated 25,363,500 bushels at a total price of $29,056,-783.75. His transactions after March 21, 1921 amounted to 2,505,000 bushels.

He did not take or make delivery on a single bushel of grain bought or sold by him.

Notwithstanding, the Supreme Court of Illinois held all the transactions made prior to March 21, 1921, valid.

So far as the instant case is concerned the significant part of the Riordon decision is the ruling that there was no evidence of an illegal intent as to the trades made before March, 1921, despite the fact that McCabe was not in the grain business, had no use for the grain, and his trades ran into millions of bushels involving $29,000,000.00.

It was only after McCabe had sunk into deep financial difficulties, evidenced by his large overdrafts with his broker, the deeds of trust he delivered to his broker, the forced liquidation of his holdings, all of which his broker knew, that the Supreme Court ruled the broker must have known McCabe could not take delivery.

In the light of the Riordon decision there cannot be any doubt as to the legitimacy of the petitioner's transactions in the case at bar.

FILED
MAY 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

AMOS C. MILLER,
EDWARD R. ADAMS,
ROBERT W. WALES,
One La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Petitioner for Certiorari Presents Solely a Question of Fact 4

II. The Issue Was Correctly Decided Below 4

A. Respondent is entitled to all reasonable inferences which may be drawn from the evidence and all conflicting testimony must be construed most favorably to him 4

B. Under the law of Illinois a transaction in grain futures is illegal where the parties intend not to settle by actual delivery 5

C. The distinction between the so-called joint account the so-called personal account 9

D. The court properly refused to direct a verdict in favor of plaintiff on the issue of the legality of his trades 10

III. Petitioner's Cases Distinguished 17

CONCLUSION 18

Authorities Cited.

Cases.

American National Bank & Trust Co. v. United States (C. C. A. 7, 1939) 104 F. 2d 783..... 5
Bartlett v. Slusher (1905) 215 Ill. 348..... 6
Board of Trade v. Christie G. & S. Co. (1905) 198 U. S. 246 17
Campbell v. McConnel (1919) 214 Ill. App. 342..... 6, 7
Dickson v. Uhlmann Grain Co. (1933) 288 U. S. 188..12, 17
Easton Farmers Grain Co. v. Fernandes Grain Co. (1923) 229 Ill. App. 102..... 6
Ehrlich v. Rothschild (1937) 292 Ill. App. 511..... 14
First National Bank v. Miller, et al. (1908) 235 Ill. 135 6
Jamieson, et al. v. Wallace (1897) 167 Ill. 388..... 8
Lamson, et al. v. West (1916) 201 Ill. App. 251..... 6, 7
Miller v. Sincere (1916) 273 Ill. 194..... 6
Nash-Wright Co. v. Wright (1910) 156 Ill. App. 243.. 6
Noble v. United States (C. C. A. 8, 1938) 98 F. 2d 441. 5
Ohlendorf v. Bennett, et al. (1926) 241 Ill. App. 537... 6
Pardridge v. Cutler (1897) 168 Ill. 504..... 6
Pratt & Co. v. Ashmore (1907) 224 Ill. 587..... 6, 8
Riordan v. McCabe (1930) 341 Ill. 506.....6, 7, 8
Salzman v. Boeing (1940) 304 Ill. App. 405.....6, 7, 14
Southern Fruit Distributors v. Fulmer (C. C. A. 4, 1939) 104 F. 2d 456..... 5
State v. Christopher (1927) 318 Mo. 225..... 12
Towne v. Buckley (1923) 230 Ill. App. 573..... 6
Weare Commission Co. v. The People (1904) 209 Ill. 528 ..... 6, 8
White v. Turner-Hudnet Co. (1926) 322 Ill. 133..... 6
Wilson v. United States (1896) 162 U. S. 613..... 16

Statutes Cited.

Section 130 Illinois Criminal Code (Ill. Rev. Stat. 1939, Chap. 38, Sec. 328) 1, 5, 14

Miscellaneous.

Wigmore on Evidence (Vol. 2, 3rd ed. 1940, Sec. 278) .. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The only question presented by the petition for certiorari is whether the record contains sufficient evidence of the illegality of particular trades of petitioner in the grain futures market to have warranted the trial court in submitting that question to a jury. An Illinois statute,* which has frequently been construed by the Illinois courts, makes transactions in grain futures illegal where the parties intend to settle on differences. Intention is, of course, a question of fact.

No federal question is involved. No important question of local law is involved because each case involving the intentions of the parties to any particular grain trade must obviously depend on its own facts.

* Section 130 Criminal Code, Sec. 328, Chap. 38 Ill. Rev. Stat. (1939).

Petitioner sustained a loss of approximately $3,000 in the corn market. He brought suit under the Sherman Anti-Trust Act to recover from the respondent approximately $50,000, including three times his loss, three times his anticipated profit, three-fold interest upon both those items, and attorney's fees.

Two issues were presented to the District Court: (1) did respondent violate the Sherman Anti-Trust Act? and (2) did petitioner violate section 130 of the Illinois Criminal Code. The District Court directed a verdict in favor of petitioner (plaintiff below) and against the respondent (defendant below) on the first issue, and submitted to the jury the second issue. The jury returned a verdict for respondent. The District Court entered judgment on the verdict and the Circuit Court of Appeals affirmed.

Petitioner's brief contains a number of unwarranted statements of fact, and many material omissions of relevant facts. Some of these will be dealt with by respondent in the argument.

Petitioner's recitation of facts respecting the respondent's acts in the corn market is not material to the petition for certiorari, because on that issue a verdict was directed against the respondent. Those matters do not serve any legitimate function in this brief and we shall not comment upon them.

SUMMARY OF ARGUMENT.

It is conceded by petitioner that the only question presented to this court is one of fact. The controversy concerns an Illinois statute construed on numerous occasions by the Illinois courts. Under Illinois law contracts in grain futures are illegal where the parties intend to settle on differences and not by actual delivery. A contract in corn futures settled by an offsetting trade is illegal where the parties intended at the time the contract was entered into that the contract be settled by the payment of differences and not by actual delivery of corn. The question of intention is an issue of fact in which each case must depend on its own particular facts. The evidence abundantly showed the transactions of petitioner to have been entered into with an intention to settle on differences and the District Court properly submitted that issue to the jury.

ARGUMENT.

I.

THE PETITIONER FOR CERTIORARI PRESENTS SOLELY A QUESTION OF FACT.

As petitioner says (p. 4, petn.) the question presented by the petition relates solely to an issue of fact. Such a question does not present any of the considerations tending to induce this Court to grant review as set forth in its rule 38. Furthermore, this Court has frequently held that it will not examine a question of fact on which the two lower courts have concurred. In any event the evidence abundantly shows an intention to settle on differences.

The Illinois statute involved has been frequently construed by the Illinois courts and no question concerning its meaning or applicability is or can be raised. There is no occasion for this court to grant certiorari since the District Courts and the Circuit Courts of Appeals in deciding a similar question are bound to look to the Illinois law. The petitioner recognizes that the law of this case can apply only to the particular facts in evidence since he urges that the legality of his trades under the Illinois statute is a question of fact.

II.

THE ISSUE WAS CORRECTLY DECIDED BELOW.

A. Respondent Is Entitled to All Reasonable Inferences Which May Be Drawn from the Evidence and All Conflicting Testimony Must Be Construed Most Favorably to Him.

Respondent, having received the verdict of the jury, is entitled to the benefit of all reasonable inferences that may be drawn from the testimony. If reasonable men might have reached different conclusions from the evidence

in this record, then the trial court properly submitted the case to the jury. *American National Bank & Trust Co.* v. *United States* (C. C. A. 7, 1939) 104 F. 2d, 783; *Noble* v. *United States* (C. C. A. 8, 1938) 98 F. 2d, 441; *Southern Fruit Distributors* v. *Fulmer* (C. C. A. 4, 1939) 104 F. 2d, 456.

B. Under the Law of Illinois a Transaction in Grain Futures Is Illegal Where the Parties Intend Not to Settle by Actual Delivery.

Petitioner urges that the discretionary power of this court to grant a writ of certiorari be invoked because the decision of the Circuit Court of Appeals is contrary to the Illinois law construing Section 130 of the Illinois Criminal Code. We believe it is accurate to say that the decision of the Circuit Court of Appeals is in accordance with, and that the contentions of the petitioner in this court are directly contrary to, a long line of Illinois cases construing that statute. It is interesting to note that although petitioner claims the decision below is contrary to the Illinois law, of the sixteen cases cited by him to support his construction of the Illinois statute, only four were decided by Illinois courts.

Section 130 of the Criminal Code provides in part:

> "Whoever contracts to have or give himself or another the option to sell or buy, at a future time, any grain, * * * where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, * * * shall be fined * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." (Ill. Rev. Stat. 1939, Chap. 38, Sec. 328.)

Under the Illinois statute both parties (in this case petitioner and B. C. Christopher & Co.) must have intended

that settlement be not by delivery of actual corn. But settlement by an off-setting trade is not the equivalent (within the meaning of the statute) of actual delivery. *Settlement by an off-setting trade is settlement on differences.* It has been uniformly held in every decision in Illinois that grain futures trades settled by an offsetting trade are illegal where the parties intended not to settle by actual delivery.

Petitioner seeks to derive comfort from language in certain Federal decisions—apparently losing sight of the fact that it is his contention that the decision of the Circuit Court of Appeals is contrary to the Illinois law.

In every one of the following cases the Illinois courts held illegal and void contracts for trades to be consummated on the Chicago Board of Trade which were settled by offsetting trades:

Riordan v. *McCabe* (1930) 341 Ill. 506.
Lamson, et al. v. *West* (1916) 201 Ill. App. 251.
Weare Commission Co. v. *The People* (1904) 209 Ill. 528.
Ohlendorf v. *Bennett, et al.* (1926) 241 Ill. App. 537.
Miller v. *Sincere* (1916) 273 Ill. 194.
White v. *Turner-Hudnet Co.* (1926) 322 Ill. 133.
Towne v. *Buckley* (1923) 230 Ill. App. 573.
First National Bank v. *Miller, et al.* (1908) 235 Ill. 135.
Nash-Wright Co. v. *Wright* (1910) 156 Ill. App. 243.
Campbell v. *McConnel* (1919) 214 Ill. App. 342.
Easton Farmers Grain Co. v. *Fernandes Grain Co.* (1923) 229 Ill. App. 102.
Bartlett v. *Slusher* (1905) 215 Ill. 348.
Pratt & Co. v. *Ashmore* (1907) 224 Ill. 587.
Pardridge v. *Cutler* (1897) 168 Ill. 504.
See *Salzman* v. *Boeing* (1940) 304 Ill. App. 405.

All of the petitioner's transactions were consummated on the Chicago Board of Trade by B. C. Christopher & Co. through the Chicago brokerage firm of Lamson Bros. In two of the above cases (*Campbell* v. *McConnel* and *Lamson* v. *West*) the transactions were also executed on the Chicago Board of Trade with the same brokerage firm—Lamson Bros.—and were held illegal.

Several arguments presented in the petitioner's brief are completely refuted by the Illinois law.

Petitioner contends that offsetting trades are the legal equivalent of delivery. There are only two ways to close out a futures contract on the Board of Trade: one is by delivery the other is by set-off. To argue that the latter is the legal equivalent of the former is merely to argue that all transactions on the Chicago Board of Trade are valid. This is directly contrary to the long line of cases cited above.

Petitioner contends that courts now take a more realistic attitude toward Exchanges, and he infers that the law with respect to the legality of grain future trading has changed. That argument was expressly rejected in the most recent case of the Illinois Supreme Court, *Riordan* v. *McCabe*, 341 Ill. 506, decided in October 1930, and was again rejected in the most recent case of the Illinois Appellate Court, *Salzman* v. *Boeing*, 304 Ill. App. 405, decided in April, 1940. In *Riordan* v. *McCabe*, the court said at page 512:

> "Counsel for plaintiffs in error argue earnestly that since all McCabe's purchases and sales took place on the board of trade under the board of trade rules they are legal and valid, and that to hold otherwise would be to destroy this agency of commerce."
>
> • • • • •
>
> "It seems obvious that the validity of the rules of the board of trade or its welfare are in nowise involved in this proceeding. *The act applies to transactions on the board of trade by members thereof as well as*

to other transactions involving gambling in grain futures. As has been frequently said by the courts in this country, it is quite as easy to conduct gambling transactions under the rules of the board of trade as it is legitimate transactions, and the validity of the rules of the board or its integrity as a business agency is in nowise involved. Since the matter is one entirely of intention, it is not material, under this statute, whether these transactions, so far as the board of trade or members thereof with whom the contracts for purchase or sale are made are concerned, occur under the rules of the board or quite outside of them." (Italics supplied.)

Petitioner contends that there is no evidence that the parties intended not to deliver because neither petitioner nor the partners of B. C. Christopher & Co. testified to that effect. He argues that respondent's evidence to prove the illegality of the trades was solely inferential. The Illinois courts have repeatedly held that the expressed intention of the parties is entitled to little weight and the real intention is to be gathered from all the facts and circumstances in evidence. *Riordan* v. *McCabe* (1930) 341 Ill. 506; *Jamieson, et al.* v. *Wallace* (1897) 167 Ill. 388; *Pratt & Co.* v. *Ashmore* (1907) 224 Ill. 587; and *Weare Commission Co.* v. *The People* (1904) 209 Ill. 528. In *Riordan* v. *McCabe* the court said at page 515:

> "It seems unneccessary to argue that if the intention of the parties is to be determined by their words alone then in such proceedings as here brought it would be impossible to show a violation of the law. The rule is, that it is immaterial whether the real intention is formally expressed in words if the circumstances in evidence show such intention, and a statement of intention that delivery should be made will not be allowed to prevail if the circumstances show the intention to have been that there should be no actual delivery of the commodities or acceptance thereof but merely an adjustment on differences."

If the parties intended to settle on differences and close out the trade by an offsetting without the transaction is illegal.

C. The Distinction Between the So-Called Joint Account the So-Called Personal Account.

The petitioner's brief is a studied effort to confuse and co-mingle the evidence concerning the business of B. C. Christopher & Co. carried on their books under the account headed "joint account," and the evidence concerning the personal account of petitioner. In order to understand the issue presented to the jury a distinction between those two accounts is fundamental. While petitioner testified that so far as he was concerned the accounts were alike (Rec. 75), the testimony of the Christopher partners is that the joint account was a part of the Christopher business (Rec. 139). Petitioner directed that account and received one-half of its profits as his compensation (Rec. 138). The legality of the trades in the joint account are not questioned for they are not involved in this controversy. All of the transactions referred to in the petitioner's brief concerning purchases and sales of actual corn were in the joint account. At page 24 petitioner states that answers to interrogatories disclosed that B. C. Christopher & Co. and petitioner made physical delivery of thousands of bushels of corn, and in a footnote on page 25 there are enumerated a number of companies to whom such sales were made. It is undisputed that *every one of those transactions* was in the joint account. All of those transactions were made and consummated in the name of B. C. Christopher & Co. as a part of their business (Rec. 89, 90, 138, 139).

There is no evidence in this record that the petitioner had *ever* delivered *any* actual corn on futures sales. On four occasions he testified that at no time in the spring

of 1931 (when the trades involved were made) did he own any corn in his personal account (Rec. 95, 96, 167).

Whether or not the business of B. C. Christopher & Co. and that portion of its business carried on under the joint account was valid and legal, is of no consequence in this controversy for these transactions involved in this case were not in the joint account but were wholly in petitioner's personal account. In the personal account petitioner merely took "fliers" in the market. It appears from the records of B. C. Christopher & Co., which are in evidence in this controversy, that petitioner *never* dealt in actual commodities in that account, never made or received a delivery of actual corn, and except for two isolated instances, never made or received a delivery of any commodity (Rec. 147-152, 190).

Respondent's Exhibit 2 (Rec. 173) shows that in the personal account when petitioner was short in one futures market he was long an equal amount in another futures market.

D. The Court Properly Refused to Direct a Verdict in Favor of Plaintiff on the Issue of the Legality of His Trades.

Since petitioner claims that the evidence was such that the court erred in submitting the controversy to the jury, it was encumbent upon him to recite in his brief all of the facts in evidence, and not merely those most favorable to him. Petitioner's statement of facts does not state that the records of B. C. Christopher & Co. show that *every transaction* of the plaintiff in his personal account for a period of ten years was settled on differences (Rec. 147-152); that his account was never charged with the purchase price or sale price of any commodity—that every trade in that account was settled on differences by charging or crediting the difference between the purchase price and the sale price to his account after the trade was closed

out (Rec. 136, 150); that petitioner opened the account by the deposit of margin (Rec. 144) and that the records of B. C. Christopher & Co. (all of those in existence when depositions were taken by respondent in 1938) do not show a single instance when the plaintiff ever made delivery on a short sale bushel of grain (Rec. 147, 148).

Potent evidence of the intention of the parties is found in the fact that in more than ten years the money ledger of B. C. Christopher & Co. for petitioner's personal account was never debited or credited with the purchase price or sale price of a commodity until *after the transaction was closed out* when settlement was uniformly made *on differences* (Rec. 136, 150-52).

The Christopher ledger sheets for the personal account are in evidence and it is significant that provision is made for a purchase and sale by offsetting trades on the exchange. The ledger contains no form to be used where in closing out the trade actual delivery is made (Rec. 154).

The man in charge of the futures ledgers of B. C. Christopher & Co. produced all of the ledgers for the petitioner's personal account and testified he examined each of those ledgers and could not find a single instance when petitioner ever made delivery of a commodity which he had sold in the futures market (Rec. 147).

The P & S slips are the only invoice ever sent to petitioner for his transactions in grain futures with B. C. Christopher & Co. No customer of B. C. Christopher & Co. ever received a bill for grain purchased or grain sold until the transaction was closed out, when he received a P & S slip—meaning "purchase and sale". It is an invoice showing the purchase price, the sale price and *the difference*—the latter being the amount for which the customer is charged (Rec. 136, 198). The P & S slips obviously show an intention to settle on differences.

Petitioner argued in his brief that our contention that the

P & S slips showed an intention to settle on differences and the opinion of the Circuit Court of Appeals to that effect was unwarranted because no person testified that the P & S slips show an intention to settle on differences. The P & S slips are in evidence. It seems obvious that all reasonable inferences may be drawn from those P & S slips and testimony as to what a witness thought they inferred would be improper.

Petitioner also argues that the P & S slips in evidence are in the same form as those shown in a book on future trading by Mr. J. M. Mehl of the Commodities Exchange Administration. It is, of course, immaterial whether the P & S slips in evidence are the same or different from those other brokerage houses. The validity of these transactions alone is involved. It is likewise immaterial whether the transactions conform to the requirements of the Commodities and Exchange Act. It was held by this court in *Dickson* v. *Uhlmann Grain Co.* (1933) 288 U. S. 188, that Federal Statutes with respect to grain trading did not alter in any manner the legality or illegality of such trades under state statutes.

Transactions similar to those in which the plaintiff was involved were before the Supreme Court of Missouri in *State* v. *Christopher* (1927) 318 Mo. 225 where the Supreme Court of Missouri held futures trades in a branch office of B. C. Christopher & Co. (the petitioner's brokers) were conducted in violation of the Missouri gambling statute.

Lamson Bros. (B. C. Christopher & Co.'s Chicago correspondent) kept all Christopher customers in one account and considered Christopher alone as its customer; it offset the transactions of one Christopher customer against those of another (Rec. 117). When the total short commitments of Christopher customers equaled the total long commitments of their customers, it is the undisputed evidence in this record that no customer would have any commitment

on the Chicago Board of Trade and Lamson Bros.' books would show that B. C. Christopher & Co. was even and out of the market (Rec. 118). Petitioner worked in the office of B. C. Christopher & Co. and was acquainted with the manner in which they did business. The manner in which they handled their accounts with Lamson Bros. is evidence that neither the petitioner nor his broker intended to settle by delivery.

Petitioner's Financial Ability.

Petitioner has argued in his brief that financial ability to carry the trade is important in determining the intention of the parties. He argues that he was financially able to carry the trade, but the evidence is to the contrary. In a period of ten months prior to the consummation of the trades involved in this suit, petitioner's transactions in grain futures exceeded in dollar value $1,400,000 and he traded in over 2 million bushels of grain futures (Rec. 180). His short commitment in July corn was, at the inception, 50,000 bushels at the contract price of $31,006.25 (Rec. 157). At the very same time his commitment in the wheat futures market included a short position of 50,000 bushels at a value of $29,831.25, and a long position of 50,000 bushels at a value of $31,581.25 (Rec. 156-157). His total obligations were thus over $90,000.

In sworn answers to interrogatories plaintiff states that at the time of these transactions he was worth $37,500. He testified he was worth $45,000. He included in both figures a membership on the Kansas City Board of Trade at $12,000 which he had privously assigned to his wife; his residence valued at $10,000 which was owned in joint tenancy with his wife; and a credit on the books of B. C. Christopher of $8,000 which the evidence shows during most of the time was a balance of $2,000, and for a part of the time was less than $500 (Rec. 84-85, 152). Reducing the lower estimate of the plaintiff's wealth by omitting the assets not belong-

ing to him, his financial worth was approximately $14,500. Yet he claims to be financially able to have consummated transactions of the aggregate value of $90,000. In *Ehrlich* v. *Rothschild* (1937) 292 Ill. App. 511 relied upon by petitioner, the transactions involved $13,210 and it was found that the trader was worth at least $50,000.

The Intention of Petitioner's Broker.

Petitioner maintained offices in the suite occupied by B. C. Christoper & Co. It is in evidence that he wrote out all of the orders for these transactions himself and sent them to Lamson Bros. for execution (Rec. 166). He was authorized to execute orders for Christopher & Co. and no Christopher partner even knew of petitioner's trades until long after the trades had been made (Rec. 135, 36, 86, 93, 96). Under these circumstances, the jury were certainly entitled to find that petitioner was the agent of B. C. Christopher & Co. The intention of the agent may be referred to the principal. *Salzman* v. *Boeing* (1940) 304 Ill. App. 405. B. C. Christopher, Jr., a senior partner in that firm testified that they never questioned a man who traded with them because if they did they wouldn't do any business (Rec. 140).

The Christopher employees referred to the futures ledger as the "option ledger" (Rec. 145) and the futures department as the "option department" (Rec. 193). Mr. Christopher testified that the ledgers for petitioner's personal trades were kept in the "option room" (Rec. 137). Options are expressly declared to be illegal under Section 130 of the Illinois Criminal Code. The manner in which B. C. Christopher & Co. kept their books and the manner in which they carried on their transactions with Lamson Bros, are further evidence of their intention to settle on differences.

The Petitioner's Truthfulness.

Petitioner's only evidence concerning the legality of these transactions is his own testimony with respect to his intention. Yet with respect to that intention, he gave the following conflicting versions: (1) that at the time of the sales he owned corn which he intended to deliver (Rec. 88); (2) that at the time these short contracts were made he owned corn but did not intend to deliver that corn (Rec. 85); (3) that at no time during the Spring of 1931 did he own any corn in his personal account (Rec. 95); (4) that he intended to deliver the corn in the joint account on his personal trades (Rec. 88); and (5) that the corn in the joint account had been sold by the joint account and he did not intend to deliver it on his personal trades (Rec. 95).

During a prior trial in 1938 he testified four times that at no time in the Spring of 1931 did he own any corn in his personal account (Rec. 167) and in the present trial that he did own "some" corn in 1931 in St. Joe, but it was not shown on any written record (Rec. 88-9). Petitioner testified he intended to deliver the corn in the joint account (Rec. 88) but he admitted (Rec. 94) and Mr. James Christopher testified that all the corn in the joint account had been sold in the futures market (Rec. 185). Mr. B. C. Christopher, Jr. testified he was not permitted to use the commodities of the joint account for his personal trades (Rec. 139).

Petitioner testified B. C. Christopher & Co. financed *his* trades and that *he* would pay *them* interest for the money he used and that at the end of the year *he* would give them fifty percent of the net earnings of *his* trades (Rec. 74). B. C. Christopher, Jr. testified that the expenditures of money for the joint account were not loans to anybody and that the joint account was a part of the business of B. C. Christopher & Co. (Rec. 139).

Other evidence of the petitioner's lack of truthfulness is his testimony that he gave many orders to Herwig—a partner in the Christopher firm—(Rec. 92), and Herwig's testimony that he never had transacted any business for petitioner (Rec. 193). Petitioner testified that he had no authority to give orders to Lamson Bros. for B. C. Christopher & Co. (Rec. 91), but Mr. Christopher testified to the contrary (Rec. 135). Although petitioner testified that joint account was his business, in a sworn application for membership to the Kansas City Board of Trade he stated he was employed by B. C. Christopher & Co. as a grain buyer (Rec. 162-3).

The petitioner's many different and unreconcilable versions of his intention are affirmative evidence of a conscious knowledge that the transactions were illegal. *Wilson* v. *U. S.* (1896) 162 U. S. 613. Such a conscious knowledge and an endeavor to conceal his real intention is the only reasonable explanation for that testimony. In Professor Wigmore's work on Evidence (Vol. 2, 3rd ed. 1940, sec. 278) he says:

> "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause * * * is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact of the cause's lack of truth and merit."

Hedging.

Petitioner argues that it is well-known in the grain business that those who hedge actual grain do not make physical delivery on futures sales. In support of his argument on hedging petitioner refers to certain facts contained in a book on commodities exchanges and in certain reports of the Commodities Exchange Commission. *That evidence was not presented to the trial court and is not in the record.*

There is no evidence in this record as to the percentage of transactions on the Chicago Board of Trade settled by delivery. There are two reasons why the hedging argument is unavailable to the plaintiff: First, not once during the trial did he testify or claim that he was hedging. Second, the existence of a hedge presupposes the ownership of actual grain. A sale of corn futures cannot be a hedge unless the seller owns an equal amount of actual grain. It is in evidence in this case that the petitioner owned no corn during the time of these trades (Rec. 167). It is in evidence that petitioner was long September corn in an amount equal to his short position in July corn. He was clearly not hedging but gambling on the relationship between the July and September futures markets.

III.

PETITIONER'S CASES DISTINGUISHED.

The petitioner has cited a number of cases not decided by Illinois courts which he contends construe the Illinois statute. Many of those cases do not even involve transactions on the Chicago Board of Trade. Petitioner relies primarily upon *Board of Trade* v. *Christie G. & S. Co.* (1905) 198 U. S. 246. In that case it was contended that the Chicago Board of Trade was itself a bucket-shop. In upholding the validity of the Chicago Board of Trade as an institution, Mr. Justice Holmes, speaking for this Court, said at page 251:

> "We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss."

The transactions in this suit, however, do not involve contracts between the members of the Exchange in the pit. The dissimilarity of the contract between a customer and his broker, and a contract between two members of the Exchange was pointed out in *Dickson* v. *Uhlmann Grain Co.*

(1933) 288 U. S. 188, where this court, speaking through Mr. Justice Brandeis, said at page 193:

> "But there were two distinct agreements: that between customer and company, in which both parties acted as principals; and that between the company and brokers on the exchange, in which both of the parties there likewise acted as principals. *It does not follow that because the contracts between the members of the exchanges were valid those entered into by the company at Carrollton with Dickson and its other customers were valid also.*" (Italics supplied.)

Conclusion.

Petitioner, the plaintiff below, received a directed verdict on one of the issues and now complains because the court did not direct a verdict in his favor on the only other issue involved. It is respectfully submitted that the Illinois statute has been repeatedly construed by the Illinois courts as making illegal grain futures trades where the parties intend to settle on differences and not by delivery. The issue of intention was one of fact which the trial court properly submitted to the jury. This case depends on its own facts and no important question of local law is involved. We therefore ask that the petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

Amos C. Miller,
Edward R. Adams,
Robert W. Wales,
Counsel for Respondent.

(27)

Office - Supreme Court, U. S.
FILED
MAY 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

REPLY BRIEF FOR PETITIONER.

J. ROBERT COHLER,
10 S. La Salle Street,
Chicago, Illinois,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Citations i

Argument 2

Conclusion 10

Table of Authorities Cited.

Board of Trade v. Christie, 198 U. S. 236.....4, 5, 9

Browne v. Thorn, 260 U. S. 137..... 5

Chicago Board of Trade v. Olsen, 262 U. S. 1..... 4

Cleage v. Laidley, 149 Fed. 346..... 5

Dixon v. Uhlmann Grain Co., 288 U. S. 188..... 10

Ehrlich v. Rothschild, 292 Ill. App. 511; 11 N. E. (2d) 623.....6, 9, 10

Gettys v. Newburger, 272 Fed. 209..... 5

Hoyt v. Wickham, 25 Fed. (2d) 777, 779..... 5

Lyons Milling Co. v. Goffe & Carkener, 46 Fed. (2d) 241..... 5

Mullinix v. Hubbard, 6 Fed. (2d) 109..... 5

Peto v. Howell, 117 Fed. (2d) 249..... 8

Ponder v. Jerome Hill Cotton Co., 100 Fed. 373..... 5

Riordon v. McCabe, 341 Ill. 506; 173 N. E. 660.....
.....3, 4, 5, 6, 10

Roundtree v. Smith, 108 U. S. 269.....10, 11

Salzman v. Boeing, 304 Ill. App. 405..... 4

Statutes Cited.

Commodities Exchange Act, Title 7, Sec. 2, U. S. C. A. 4

Illinois Revised Statutes 1939, Chap. 38, Sec. 320.... 7

MISCELLANEOUS.

Baer & Woodruff "Commodity Exchanges" (Third Edition, 1929, 1935..... 4

H. C. Emery "Speculation on the Stock and Produce Exchanges of the United States" (1896), 100-101.. 4

Hedging in Grain Futures, Official Bulletin No. 151 U. S. Department of Agriculture, Page 15..... 7

Legal Status of Trading in Futures by H. S. Irwin, 32 Ill. Law Review 155.....3, 4, 6

Senate Report No. 871, 67th Congress, Second Session, Page 3..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

REPLY BRIEF FOR PETITIONER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

In reply to the brief of the respondent, we respectfully present the following:

ARGUMENT.

I.

Respondent states the question involved is one of fact and the jury on the last trial, having found for him, the matter is concluded. In the opening paragraph of his brief, he states:

> "The only question presented by the Petition for Certiorari is whether the record contains sufficient evidence of the illegality of particular trades of petitioner in the grain futures market to have warranted the trial court in submitting the question to a jury."

Petitioner submits that this is not a question of fact but quite to the contrary, a question of law.

Reply to Point II.

The theme of respondent's brief is the same as presented by him in his brief filed in the Circuit Court of Appeals, namely, that petitioner did not make physical delivery of corn on his sale of 35,000 bushels of Chicago July 1931 corn "futures" and hence the transaction is illegal. What neither respondent nor the Circuit Court of Appeals commented upon in its opinion is the fact that by his illegal monopoly of the July 1931 corn market on the Chicago Board of Trade, respondent made it physically impossible for any short seller including petitioner to make physical delivery.

It is not disputed that in violation of the Sherman Anti-Trust Act, through the means of "dummy" accounts, through falsification of reports to the Grain Futures Administration, respondent was able to corner the corn market by acquiring 7,440,957 bushels of Chicago July corn

constituting 97 per cent of the total commercial visible supply in Chicago. (Ex. 100, Rec. 51; Ex. 80, Rec. 130.)

Petitioner testified, and it is not contradicted, that during the last three days of July, 1931, when the respondent artificially enhanced the price of corn 24½¢ a bushel, petitioner could not even buy 35,000 bushels of corn in the largest grain market in the world to make delivery. (Rec. 80.)

It would seem a perversion of justice to sustain respondent's contention that petitioner was gambling, as evidenced by the fact that no physical delivery took place, when respondent, by his own illegal act, made physical delivery impossible.

Reply to Remainder of Point II.

Under Point II, respondent argues *that an offsetting trade constitutes a settlement in differences.** He cites some fifteen cases which he claims are in support of such contention. The first case, namely, *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660, holds exactly to the contrary and is relied upon by petitioner. Of the remaining fourteen cases, all but two were decided before the enactment of the Grain Futures Act (now known as the Commodities Exchange Act) and the supervision of Exchanges by the Grain Futures Administration. Some of the cases were decided around the turn of the century when even a committee of the Illinois legislature and many courts considered the Chicago Board of Trade an economic evil and in the same light as a "bucket shop." See "Legal Status of Trading in Futures," 32 Ill. Law Review, 155.

In practically every case cited by respondent, the facts themselves distinguish the cases from the instant one, and the persons seeking to hold the transactions gambling,

* All italics ours unless otherwise indicated.

such as retired farmers, physicians, bank cashiers and others, were not even remotely connected with the grain trade. In the same manner *Salzman* v. *Boeing,* 304 Ill. App. 405 is distinguished on its facts and also because the point of law out of which the appeal arose is not the same as in the instant case.

That a futures trading market performs many necessary economic functions can no longer be disputed. See "Legal Status of Trading in Futures," 32 Ill. Law Review 155 by H. S. Irwin. Even Congress has recognized that commodity transactions known as "futures" are affected by a national public interest. See "Commodities Exchange Act, Title 7, Section 2, U. S. C. A.

Commodity future trading is not only of great economic value but legitimate speculation is indispensible to the proper functioning of the futures market. See Senate Report No. 871, 67th Congress, Second Session, Page 3; *Riordon* v. *McCabe,* 341 Ill. 506, 514; *Board of Trade* v. *Christie,* 198 U. S. 236, 249. See also Baer & Woodruff Commodity Exchanges (Third Edition) 1929, 1935, at pages 125 and 126; H. C. Emery "Speculation on the Stock and Produce Exchanges of the United States" (1896), pages 100-101.

It is a fact that of the billions of bushels of futures dealt in annually on the Chicago Board of Trade, less than 2 per cent are settled by delivery. In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, upholding the constitutionality of the Grain Futures Act, the late Chief Justice Taft notes than less than 1 per cent of all contracts made on the Chicago Board of Trade are settled by delivery.

Respondent would have this Court believe that setoff constitutes a settlement on differences in violation of the Illinois Statute and thus it would follow that the Commodity Exchange Administration is merely supervising a big gambling organization on which 98 per cent of all

transactions are illegal because they are settled by offset and not by physical delivery.

Since they are directly in point, respondent for obvious reasons makes no attempt whatsoever to explain or distinguish the cases cited by petitioner. The leading case, *Board of Trade* v. *Christie*, 198 U. S. 236, which holds at page 248 that "setoff has all the legal effects of delivery," while referring to dealings between members on the exchange was soon applied by the courts to include dealings between customer and broker. See *Riordon* v. *McCabe*, 341 Ill. 506; *Cleage* v. *Laidley*, 149 Fed. 346; *Gettys* v. *Newburger*, 272 Fed. 209; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109; *Browne* v. *Thorn*, 260 U. S. 137; *Hoyt* v. *Wickham*, 25 Fed. (2d) 777, 779; *Ponder* v. *Jerome Hill Cotton Co.*, 100 Fed. 373, *Lyons Milling Co.* v. *Goffe & Carkener*, 46 Fed. (2d) 241.

Petitioner states that respondent's statement that the leading Illinois case, *Riordon* v. *McCabe*, 341 Ill. 506, 173 N. E. 660 holds that trades settled by setoff are illegal and void is a misstatement of fact which can be ascertained by a mere reading of that decision.

As set forth in the appendix in petitioner's Brief in support of Petition, McCabe was a farmer whose trades on the Chicago Board of Trade during 1919, 1920 and 1921 were highly speculative. Up to March of 1921, he bought and sold in excess of 25,000,000 bushels of grain at a total price in excess of $29,000,000.

Each and every transaction was closed out by an offset and he did not take or make delivery on a single bushel of grain bought or sold by him.

The Supreme Court of Illinois said, 341 Ill. 506, at 509:

> "We are of the opinion that as to the period prior to March 1, 1921, the evidence does not disclose an intention on the part of the plaintiffs in error contrary to the statute * * *."

It was only after McCabe had sunk into deep financial difficulties, evidenced by large overdrafts with his brokers, the mortgages which the brokers took on his farm and the forced liquidation of his holdings, all of which his brokers knew, that the court held the transactions made *subsequent* to that time were illegal.

Petitioner contends that the decision of the Circuit Court of Appeals in the instant case is directly contrary to the Illinois law as set forth in *Riordon* v. *McCabe,* 341 Ill. 506; 173 N. E. 660, and *Ehrlich* v. *Rothschild,* 292 Ill. App. 511; 11 N. E. (2d) 623; and contrary to the law of the other Federal Circuits.

Answer to Respondent's Contention That B. C. Christopher & Company Intended to Gamble.

Respondent states in Point 2-D (pp. 10-14) of his brief that the evidence which indicated an intent on the part of B. C. Christopher & Company to gamble is:

1. The ledger sheets show settlement by offset.

2. The P and S slips show an intent to settle on differences.

3. B. C. Christopher & Company refers to its futures ledger and the futures department as the "option ledger" and the "option department."

This is the same argument made by respondent in the Circuit Court of Appeals and is the only evidence which the Circuit Court of Appeals commented upon as inferring an illegal intent on the part of B. C. Christopher & Company to gamble.

The ledger sheets of B. C. Christopher & Company do show trades closed out by offsets. However, in excess of 98 per cent of all trades on the Chicago Board of Trade will show the same. This does not constitute the slightest evidence of an intent to gamble. See "Legal Status of Trading in Futures", 32 Ill. Law Review 155 by H. S.

Irwin and the cases cited directly on this very point in petitioner's Brief in support of Petition on pages 20-23. See also testimony of respondents own auditor (Rec. 180-181) and "Hedging in Grain Futures", Official Bulletin No. 151 U. S. Department of Agriculture (page 15 thereof) both of which are referred to on pages 33-35 of petitioner's brief.

The statement that the "P" and "S" slips indicate an intention to gamble has already been answered in petitioner's brief. (Pages 32-33.)

With respect to respondent's argument that the fact that B. C. Christopher & Company refers to its "futures" ledger as the "option ledger" and its "futures" department as its "option department" and hence this is evidence of an intent to gamble. We wish merely to state here that options are not declared illegal under the Illinois Act. The only options or contracts declared illegal are those where at the time of the making of such contract or option, it is the intention of both parties to the contract or option that the same be settled only by the payment of money differences. See Ill. Revised Statutes 1939, Chap. 38, Sec. 320. Respondents contention about "options" has been fully answered in petitioner's brief on pages 35-36.

Answer to Respondent's Contention as to Petitioner's Financial Ability.

The conclusion respondent arrives at, and which is apparently adopted by the Circuit Court of Appeals, that petitioner's obligations exceeded $90,000.00 defies explanation. (Respondent's brief, page 13.)

Respondent makes this statement to indicate that petitioner who testified he was worth about $45,000.00 was unable to carry his trades.

That petitioner did not default when respondent applied

. 583

2 of 2

the "squeeze" but promptly paid the amount dictated by respondent means nothing to him.

Respondent arrives at this remarkable conclusion by stating that petitioner sold 50,000 bushels of corn at a price of $31,006.25; 50,000 bushels of wheat (short) at a price of $29,831.25; and that petitioner bought (long) 50,000 bushels of wheat at a price of $31,581.25—and by simply adding all figures together, debits as well as credits, the total of $90,000.00 is reached.

The Circuit Court of Appeals (on what basis petitioner can still not understand) seemingly adopted respondent's arithmetical calculations and without citing figures, however, stated flatly:

> "To have effectuated actual delivery would have required many thousands of dollars." *Peto* v. *Howell*, 117 Fed. (2d) 249, 252.

In respect to the 50,000 bushels of corn sold short by petitioner the record discloses that he was, in fact, short only 35,000 bushels, having previously closed out 15,000 bushels (Rec. 76, 81; Ex. 149, 153; Rec. 82-84) and that at the same time petitioner bought 35,000 bushels of Chicago September corn so that his position as a whole in the market was even. (Rec. 81.)

In regard to the wheat, petitioner was short 50,000 bushels for which he was to receive $29,831.25 and long 50,000 bushels for which he was to pay $31,581.25. His total debit obligation on the wheat was $1,750.00, and not the sum of $61,412.50, arrived at by adding the debit and credit together, as respondent would have this court believe.

The evidence shows that respondent traced all of petitioner's sales and purchases from November 20, 1930 through July 31, 1931 and that excepting for a few days, petitioner was as many bushels "long" as "short" and for those few days he was never "long" or "short" more than 10,000 bushels. (Rec. 181.) This is all graphically

shown on respondent's Exhibit 2 of February 5, 1940. (Rec. 173.)

At no time during this entire period, if petitioner is given credit for the sale price he was to receive, instead of adding it onto the purchase price he was to pay, did his obligations exceed a few thousand dollars.

III.

Petitioner's Cases as Distinguished by Respondent.

Under Point III respondent starts to distinguish cases cited by petitioner but stops with *Board of Trade* v. *Christie,* 198 U. S. 246. Because he cannot, respondent makes no attempt to distinguish the many cases cited in petitioner's brief or the law as set forth in the "Restatement of Contracts" and the example given by the authors of the Restatement, cited on page 17 of petitioner's brief.

Ehrlich v. *Rothschild,* 292 Ill. App. 511, 11 N. E. (2d) 623, relied upon by petitioner (together with *Riordon* v. *McCabe*), is disposed of by respondent on page 14 of his brief by a statement that the transactions there involved amounted to $13,210.00, whereas the trader was worth at least $50,000.00. *This, again, is a misstatement of fact which a reading of said case will readily disclose.* The transactions out of which the litigation arose in that case involve more than $13,210.00. Defendant obtained this figure by selecting one excerpt from the Ehrlich case, on page 625, where the Court said:

> "Exhibit 4 is a statement on the stationery of the defendants showing this transaction (200 shares of U. S. Steel) to the extent of $13,210.00."

The evidence in the Ehrlich case showed that after this purchase, the price of U. S. Steel declined and the broker urged Ehrlich to recoup his losses by buying wheat futures.

The total purchases of Ehrlich amounted to $83,210.00 (pp. 626-27), a slight difference between such amount and $13,210.00.

Respondent relies on *Dixon* v. *Uhlmann Grain Co.*, reported in 288 U. S. 188 and decided by a divided court. (Justice Stone and the late Justices Butler and Cardoza dissenting.) However, that case is distinguished in the words of the majority opinion when the Court said at page 195:

> "* * * Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrolton, two were farmers, two were clothing merchants, and one was an ice dealer. *These defendants, who were not in the grain business, who had never traded on a grain exchange,* and who had no facilities for handling grain, purported to buy and sell in amounts up to 50,000 bushels in a single transaction, * * *"

Conclusion.

There is no evidence in the record that shows an intention on the part of petitioner and B. C. Christopher & Company to settle on differences only, and that such intention was mutual and disclosed.

The Circuit Court of Appeals decided the instant case directly contrary to the Illinois law as set forth in *Riordon* v. *McCabe*, 341 Ill. 506, 173 N. E. 660; *Ehrlich* v. *Rothschild*, 292 Ill. App. 511, 11 N. E. (2d) 623, and the other Federal cases cited.

So far as petitioner knows, this decision of the Circuit Court of Appeals is the only one on record holding transactions between two members of Boards of Trade, both devoting all of their time to the grain trade, both dealing in actual grain, are gambling when the only one so contending is a third party (respondent) (see *Roundtree* v.

Smith, 108 U. S. 269) to escape the consequences of his own illegal monopoly.

It is therefore respectfully urged that the judgment of the Circuit Court of Appeals be reversed and to that end a writ of certiorari should be granted.

J. ROBERT COHLER,
Attorney for Petitioner.